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90-1203

FILED
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Case No._____

SUPREME COURT OF THE UNITED STATES

October Term 1990

GENE P. MURRAY
Petitioner

V.

OHIO ADULT PAROLE AUTHORITY, OHIO PAROLE BOARD, RAYMOND CAPOTS, CHAIRMAN
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Gene P. Murray
513 W. Culbertson Street
Fostoria, OH 44830
419/435-2284
Parolee, In Pro Se

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THE QUESTIONS PRESENTED FOR REVIEW

1. At issue is the questionable cloak of sovereign immunity over Ohio's affirmative action plan to maintain, through Ohio agencies, a 50/50% white/black, two-tiered "racial balance" in Ohio's statewide prison inmate population.

2. At issue is whether the State of Ohio's affirmative action plan to maintain, through Ohio agencies, a statewide 50/50% white/black prison inmate population violates the inherent meaning of the equal protection and due process clauses of the Fourteenth Amendment.

3. At issue is whether the Ohio state-actions of suspect racial classifications are so entrenched, imposing, and adhesive in this case, as to pierce the immunity veil, and thereby preserve the integrity of the actual stated wording of the 14th Amendment's equal protection clause.

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PETITION

Whereas, Gene P. Murray, a State of Ohio prisoner-parolee, comes before the Supreme Court of the United States, and hereby files in pro se, this Petition for the Writ of Certiorari, to review the October 17, 1990 decision of the U.S. Court of Appeals for the Sixth Circuit, Case No. 90-3071, to the extent that it dismissed all of his United States Constitutional claims against the Ohio Adult Parole Authority and the Ohio Parole Board; and to the extent that it dismissed part of his United States Constitutional claims against Raymond Capots, Chairman.

Specifically, the Petitioner maintains that the Respondents are operating an unconstitutional affirmative action plan in Ohio's prison system, well-meaning in its purpose, but nevertheless violative of the equal protection clause of the 14th Amendment to the United States Constitution.

The said affirmative action plan is commonly known as the State of Ohio Prison System's "racial balance" policy, and it is designed to keep 50% of Ohio's prison inmate population "white," thereby projecting a cosmetically-diplomatic James Cagney-esque appearance over a statewide prison inmate population that is increasingly black.

The State of Ohio is inextricably entwined and involved in the conception, framework, and operation of this affirmative action plan; and the State is unconstitutionally granting and denying paroles on the determinative and decisive criterion of racial identity.

In regard thereof, the "racial balance" policy of the State of Ohio is officially computed and enforced through the ubiquitous and omnipresent use of the following photocopied State of Ohio Prison System Race Count Form.

Date	Name	Number	Race	To	From	White Count	Black Count	Time	TOTAL

USE CODES TO DESIGNATE MOVEMENT

SC / DC / LC / PC / INF / AWL / 48 / EDS / FURL / PARL

or Institution Designations.

As should be self-evident from the white-black nature of the Race Count Form, no other racial groups "count" in Ohio's prison inmate population. In fact, whites are in such demand, as to result in the State of Ohio's racially prejudicial and culturally insensitive designation of American Indians, Orientals, Latinos, and every other ethnic/racial group, other than blacks, as officially identified and classified (by the State of Ohio) as all being "whites," in order to socially idealize Ohio's prison system and more readily attain the State's ongoing objective of a 50-50 white/black inmate population racial ratio, thereupon keeping Ohio's affirmative action 50/50% "racial balance" plan viable and operable.

Petitioner Murray is a first-time (and only time) offender, with no other DWI's on his driving record, and was fully licensed and insured, with no prior crimes,

and no prison inmate infractions.

Yet Petitioner was continually denied parole, until his 4th hearing, by the Respondents Ohio Adult Parole Authority and the Ohio Parole Board, because of the State of Ohio's affirmative action "racial balance" plan to keep 50% of its prison inmate population "white."

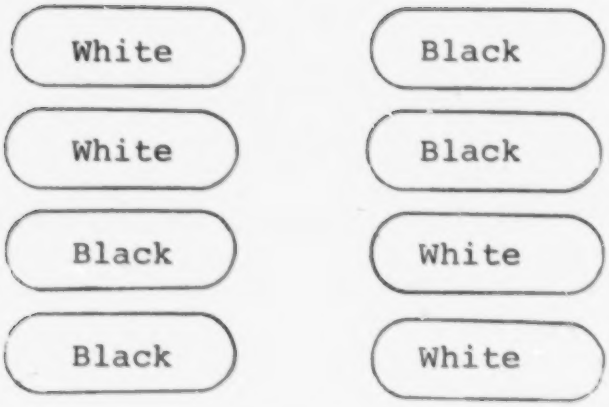
Petitioner attests that black inmates with numerous DWI's, prior felonies, no driver's license, no auto insurance, and a host of prison inmate infractions, have all been routinely granted parole at their first parole hearings. Petitioner emphasizes that with an astounding 100% predictability, the paroles at first hearings, in drunk driving fatality cases, are being decided along racial lines.

As a prisoner, Petitioner began and ended each day in his pre-assigned "white" designated bed space in the Ohio State Prison System, which is determined to keep

the said 50/50% white/black inmate population racial ratio, despite an incoming statewide inmate population that is now 33% white and 67% black.

It should be mentioned that the Petitioner's case is only the proverbial tip of the iceberg, as the Ohio Parole Board's racially prejudicial discrimination runs the range of cases, from first degree murder to fourth degree drug possession.

As proof that Ohio's racial balance policy is prejudicially discriminatory, Petitioner respectfully requests the Court to observe the workings of the following chart, which is a copied section of the typical racially assigned bed chart, this one at the Marion Correctional Camp, in the Ohio State Prison facility where the Petitioner was incarcerated. The bed spaces are arranged in a 50/50 sequence: two whites, two blacks, alternatively ad infinitum:



Please note that the chart's bedding capacity is designed to be reserved for only 50% blacks, although the incoming male inmates to the Ohio Prison System (and incoming) to the Marion Correctional Camp) are presently 67%, or at least two-thirds, are black.

This 67% into 50% won't go, and so the State of Ohio's fixed chart becomes the State of Ohio's flow-chart, a very racially prejudicial flow-chart, effectually "computer programming" the prison system to release the excess blacks and to retain the numerically precious whites, and to thereby preserve the 50/50 ratio, as indelibly fixed into the blueprint of

the State of Ohio's bed chart.

Whenever the 50/50 ratio is threatened (which is always), the State owned-and-operated chart graphically depicts and directs what needs to be done by the State employees, i.e. look for blacks to release, and look for whites to jealously guard against releasing.

As hitherto noted, the State of Ohio is trying to stem the two-thirds incoming mathematical tide, and to somehow, by hook or crook, keep a quote, "racial balance," (its own Orwellian doublespeak terminology) of around 50% whites, 50% blacks, irrespective of each individual's personal record, merit, or worthiness for parole.

Hence, the State has a need to "balance the books," using its Race Count Form, whose only function is to toll the alarm bells that the black count is becoming too high, and the white count is becoming too low, thereby jeopardizing the entire State

infrastructure and superstructure of "racial balance." Again, Petitioner cannot overemphasize that the purpose, the only purpose, of the Ohio State Prison System's "Race Count Form," as photocopied on page 3, is for the State of Ohio to keep an agonized, wary eye over the rising black count, and to lamentfully dread the falling white count, percentage-wise; and to therewith set into motion the creative accounting necessary to take the measure of the ceiling over the black count, and the measure of the floor under the white count, and accordingly proceed to stabilize the diverging counts through the monthly balancing act of racially biased parole decisions.

The very existence of the Ohio Prison System's Race Count Form is prima facie evidence of a two-tiered System, one black and one white, and of which a membership in the latter denies an inmate's Constitutional right to equal protection under the

laws, as guaranteed by the 14th Amendment.

The State of Ohio's Race Count Form is the foundational two-tracked channeling device in the State-sanctioning of a racially dual parole system, with decidedly double standards of evaluating the inmates for parole worthiness, distinguishing them first and foremost, in terms of black and white, and not by their previous records, not by their prison behavioral records, and not by the content of their character, but by the color of their skin.

It can be gathered from its Race Count Forms that the State is not so much interested in an inmate's race for legitimate identification purposes, but rather is concerned with what effect each individual inmate's entrance and possible parole or furlough exit will have on the ebb and flow of the all-important, day by day, inmate by inmate, ongoing two-track, white/black "Race Count." That's the bottom line, as

should be evident, from the design of the Race Count Form itself.

Petitioner maintains that the Ohio Race Count Form is inherently incompatible with and repugnant to any judicious interpretation of the 14th Amendment's equal protection clause, expressly worded in Section 1..."Nor shall any State deny to any person within its jurisdiction the equal protection of the laws."

Above and beyond the 11th Amendment, there stands the 14th Amendment to the United States Constitution, which was supposed to put an end to State-entitied prejudicial discrimination on account of race.

For there are no states' rights to discriminate on the basis of race, as State-sanctioned racial prejudice does not come with an 11th Amendment warranty.

The various State personnel, the State employees, and the State's politically appointed department heads are temporal and

transitory, but the State's race count forms and racial flow-charts are locked into a fixed position, and their machinery is intact and built to last.

The racial bed charts measure an imposing 6 feet by 4 feet, and are prominently displayed above the wardens' desks in the State prisons' administrative offices, like some holy shrines of omnipresent, omnipotent guidance and absolute, infallible direction, hanging over the shoulders of the State's employees, and "telling" them, in no uncertain terms, of the structural necessity, by design, to keep the racial ratio intact.

One would have to be colorblind not to see them, and quite naive not to know of the racial bed charts use as inanimate objects with a life of their own....State owned-and-operated prejudicial icons built into the System.

Over the years, the State's flow-charts

and race count forms have become deeply imbedded into the white/black, two-track, parole system of the Ohio Adult Parole Authority, which intrinsically and structurally is programmed to release blacks and to retain whites.

Under Ohio's dual system, the more eligible "excess" blacks are routinely culled out at the monthly parole hearings early each respective month, to make room for the new arrivals of predominantly black inmates, later in the month, as shown by the photocopied State inmate racial transferee list (Yes, in Ohio, there is such a thing), on the following page.

On this list of August 31, 1989, all transferees are black, except for one white, State-lettered "B" and "W", and these incoming prisoners are replacements for the monthly "racially balanced" exiting parolees.

Note the State Seal on the upper left corner of the racial transferee list.

RICHARD F. CELESTE
GOVERNOR

[redacted]

[redacted]
Columbus, Ohio 43229

DATE: AUGUST 30, 1989

TO: WALTER ECHOLS, WARDEN, CORRECTIONAL RECEPTION CENTER

FROM: BUREAU OF CLASSIFICATION & RECEPTION,
DIVISION OF MANAGEMENT INFORMATION SYSTEMS

RE: INMATE TRANSFERS FROM THE CORRECTION RECEPTION CENTER

MARION — RECEIVING INSTITUTION

THURSDAY, AUGUST 31, 1989 — TRANSFER DATE

SECURITY LEVELS:

TOTAL	MIN	MED	CLO	MAX
10				

B	213 208	JONES, CHRISTOPHER C.
B	213 211	LOTT, NATHANIEL
B	213 214	BIGGUMS, GORDON L.
B	213 230	JACKSON, ERROLL
B	213 233	LYNDSEY, ANDRE
B	213 242	ROBINSON, KENNETH
B	213 255	PHILLIPS, RICHARD
B	213 287	SEVERE, RONALD E.
W	213 297	TRUESDALE JR, RICHARD L.
B	213 320	LIGON, DESMOND

Roger T. Overberg / amp
Roger T. Overberg, Chief
Bureau of Classification and Reception

Walter Echols, Warden
Correctional Reception Cent

cc: Warden, Rec. Inst.; (via telecopier); APA; P.J. Butchko; B. Elias, F

As is readily deduced, the oxymoronic "structural integrity" of Ohio's 50/50% inmate racial balance is only accomplished through the State's extremely biased and prejudicial granting and denial of paroles, along black/white racial lines.

The statewide 50/50% inmate population figure is duly verified and so reported, in the December 1989, Year-End Issue, of the Ohio Prison System's State Departmental Newsletter, "The Communicator," published four months after the preceding August racial transferee list, and published two months after Petitioner filed his lawsuit in Oct. 1989; with the Communicator article herein photocopied on the next page.

It should be stated and gathered that the Communicator's use of the term "50% minority" is misleading, as non-black minorities do not "count" in the State of Ohio's two-tiered Race Count Forms, but are lumpsummed together with whites, as "whites."

The COMMUNICATOR
Ohio Department of Rehabilitation and Correction
Richard F. Celeste, Governor Year-End Issue 1989 George W. Wilson, Director

The expansion of educational programs are proving to be successful, and we now have inmates tutoring fellow inmates.

A $500,000 federal grant has helped us place substance abuse coordinators who oversee inmate treatment and prevention at all of our 21 prisons. The grant also is partly funding a $666,000 "Say No In Time" treatment program.

To ensure good management practices that reflect our 50 percent minority inmate population, the department enhanced its hiring of women and minorities. This effort also includes the appointment of the first woman and Black to become major in the department's history.

If we address our challenging opportunities in the 90s with the same unified spirit that we demonstrated this past year, we will once again be proud to record our year-end accomplishments.

I look forward to working with all of you next year. Most of all I wish the best for you and yours during this holiday season.

Thus, in pointed circumlocution, the State of Ohio "Communicator" report is really a reference to 50% blacks, not 50% minorities (again the State attempt to minimize the number of blacks, and maximize the number of whites), as can be ascertained by the insertion of a sample photocopied page from an Ohio prison inmate roster listing, State-encoding race (R) by its use of "B" or "W" at the far right, on the next page of this Petition.

Please observe that any Latino Americans with Hispanic sirnames, for example, are regarded and categorized as whites, without exception, literally stereotyped into Ohio's two-tiered System.

The Communicator's "50% minority" statement, therefore, is not necessarily meant to be taken out of context, but can be well-put into the context of what can, and does, happen when an impersonal State puts everyone down, only in terms of black and white, according to form.

NUMBER	NAME	LOCK	U	LOCATION	DISP	DATE	DATE	R
179642	HUNDLEY, CHARLES*	S/	5	PORTER			0889	B
180039	RUSSELL, DAVID	S/	5	KITCHEN				W
180805	SCHAFFER, DONALD	S/	5	PORTER				W
181065	BAKER, NICHOLAS	S/	5	UNASSIGNED				W
181345	FELVER, JAMES	S/	5	HOGLOT				W
181369	DeMOSS, CHARLES	S/	5	DAIRYBARN				W
181872	RAMSEY, JULIUS	S/	5	PORTER STOCKADE			0289	B
181973	BLAIR, CHARLES	S/	5	FMG 3				B
183192	HICKMAN, BRADLEY	S/	5	PORTER			0789	W
183202	SANDERS, BRUCE	S/	5	GROUNDS KEEPER				B
183760	ALLEN, WILLIAM	S/	5	BARBER SHOP				B
184813	ARNOLD, LAMAR	W/	5	DORM PORTER	AWL1		0989	B
185755	LEE, JAMES	S/	5	FMG 2				B
185766	ERVIN, CARL	S/	5	POWERHOUSE				W
187253	OWENS, JIMMY	S/	5	STOREROOM				B
187260	JOHNSON, JOSEPH	S/	5	HOGLOT				B
188186	CHASE, RONNIE	S/	5	LEGAL CLERK				W
188193	FENNELL, CARIS	S/	5	DORM HELP				B
188243	PEA, JOEL	S/	5	POWERHOUSE				B
188357	MOORE, JOHN	S/	5	DORM HELP				B
188378	BARTELS, TERRY	S/	5	FMG CLERK				W
189705	SANDERS, JOSEPH	S/	5	GARAGE		R10#		B
190487	CONWAY, LARRY	S/	5	STOREROOM				W
190677	SAPP, STEPHEN	S/	5	LAUNDRY				W
190880	McDOUGHALL, MELVIN	S/	5	LAUNDRY				B
191154	CURL, JACK	S/	5	GROUNDSKEEPER				W
191686	MARQUEZ, DAVID	S/	5	HOGLOT				W
191805	GAYTON, WHEELER	S/	5	CLERK				W
192493	McCLAIN, LARRY	W/	5	WO2/12/87	AWL2			W
192782	REEVES, LEROY	S/	5	FMG GRAINERY				B
193757	JUSTICE, JAMES	S/	5	KITCHEN				W
194921	HOWELL, CHARLES	O/	5	MAINT REPAIR	ODC		0989	W
195565	JOHNSON, GARY	S/	5	RUNNER A-BLDG				B
195784	SANTOLI, ANTHONY	S/	5	DAIRYBARN				W
196355	BULGER, JAMES	S/	5	FMG TRACTOR				B
196559	LEWIS, CURTIS	S/	5	POWERHOUSE				B
197316	COLAN, JUAN	S/	5	MAINT REPAIR				W
198147	HOWELL, DON	S/	5	DAIRYBARN			0789	B
198405	BURGESS, MARSHALL	S/	5	MAINT GENERAL				W
199101	ALLEN, WAYNE	S/	5	DORM HELP				B
199858	WEAVER, ERIC	S/	5	KITCHEN				B
199862	KEATH, MILES	S/	5	YARD WORKER				B
200074	MERRICK, GEORGE	S/	5	STOREROOM				W
200183	CRUMP, RICHARD	S/	5	TUTOR				W
200375	EVERHARDT, DANNY	S/	5	FMG CARPENTER				W
200503	PEARSON, JOHN	S/	5	DORM PORTER		R11#		B
201104	BROWN, JOHN	S/	5	RECREATION				B
201271	JACKSON, DEMETRIUS	S/	5	KITCHEN				B
201453	MURRAY, GENE	S/	5	CLERK				W
201534	DURHAM, CHARLES	S/	5	KITCHEN				B
202032	OSBORNE, MELVIN	S/	5	KITCHEN				W
202102	CAVANAUGH, MICHAEL	S/	5	HOGLOT				B

Let there be no mistake about it.... the State of Ohio is obsessed with an ideal, if not idealistic, 50/50 Solomon-cut of its inmate population. Accordingly, "racial balance" now absolutely pervades the State of Ohio's parole granting and denial decisions. A very telling statistic would be the number of shock paroles granted to inmates with indefinite sentences. Blacks now receive nearly all of the shock paroles granted to inmates with indefinite sentences. Whites now receive only a negligible number of shock paroles for inmates with indefinite sentences. Please note that shock paroles for indefinitely sentenced inmates are generous gifts of time, and the State of Ohio cannot afford to give them to white inmates, whose precious presence it needs to fill those "white designated beds" in the cells and dormitories of Ohio's correctional institutions. Truly, it is the law of supply and demand, as it operates in the "racially

balanced" twilight zone of the Ohio State Prison System.

The subpoenaing of that one statistic alone, from the Ohio Adult Parole Authority (regarding shock paroles for indefinitely sentenced inmates) would shed much light and begin to reveal the severity and scope of the State of Ohio's pervasive and pernicious policy of granting and denying paroles on the basis of race.

Please keep in mind that this is not an affirmative action plan for police department promotions or construction contracts. This is an affirmative action plan for the deprivation of liberty: a State plan to retain people in prison on account of race.

The term "racial balance" is actually a misnomer, as it is more of a policy of "racial ballast," if you'll pardon the pun, with the State invariably seeking to release blacks and to retain whites in order to keep its 50/50% affirmative action plan afloat.

Under basic economic principles, it's called marginal utility, and the whites have it, and the blacks don't. Through its insistence on a "racial balance," the State of Ohio draws no other conclusions from its keeping of an ongoing, two-track, white/black, cumulative race count, other than to enhance the retentive marginal utility of the dwindling incoming race, that of those individuals deemed "white" by the Ohio State Prison System.

Although it is both a ghoulish and a hideous calculation and inequation, the Ohio Adult Parole Authority is enforcing the racial balance in its prison system ....by "hanging onto the white guys," and this is exactly what is happening.

Petitioner begs this Highest Court to have the judicial will and political indifference necessary, in modern era America, to consider the unprecedented U.S. Constitutional violations of this State-action.

In your consideration of this case, please let me assure you that I am not a racist, and I will not embarrass your Court. Indeed, before I came to prison, I fancied myself as a Democrat and a liberal. I am one of the few educated inmate-parolees, and one of the very few who has ever heard of the 14th Amendment.

If nothing else, this Petition will at least place the issue "on the record" before your Court, as to serve notice of the racially prejudicial granting and denying of paroles by the State of Ohio, in flagrant disregard for the equal protection clause of the 14th Amendment.

So, in the form of a prisoner-parolee's pro se lawsuit, there herein resounds the following cry in the wilderness:

"Inmates are serving extra years in the Ohio State Prison System, only because of their race."

Petitioner respectfully suggests that

the meaning, the magnificence, and the federally-enforced power of the United States Constitution are fundamentally and effectually lost upon any person whose racial identity is the precursive and the controlling criterion of a State-conceived and State-actioned prejudicial policy for determining one's retention in prison.

It can only be the saddest of ironies that the State's racial balance policy often tends to hurt the race of people it was meant to help, by prematurely releasing ineligible, unrehabilitated, repeat offenders into neighborhoods that are predominantly black, making it all the more likely that blacks will continue to fall victim to crime in disproportional numbers.

And so goes the inherent boomerang to and from any suspect State racial classification, coming back to haunt any self-respecting pluralistic democracy, in time-dishonored memory. Korematsu v. United

States, 323 U.S. 214 (1944).

Ohio is only "getting away with this" because its State prison system is a society closed unto itself, with locked gates, iron bars, razor wires, and State security personnel to shield all of the various State-action trappings of racial paraphenalia.

In recognition thereof, the pro se Petitioner realizes that it's possible to sue an offending and imposing government agency, for injunctive relief, i.e. that it's been done before, in the successful pursuit of injunctive relief from 14th Amendment equal protection violations, as Brown was accorded the opportunity to sue the Board of Education as a government agency itself, in the landmark case, Brown v. Board of Education, 347 U.S. 483 (1954).

Certainly, State-printed race count forms and racial bed and cell charts are just as two-tracked and two-tiered as gerrymandered school districts.

Petitioner therefore respectfully asks this Court: Does the 14th Amendment really mean what it says?.....that nor shall any State deny to any person within its jurisdiction the equal protection of the laws.

It is impossible to believe that the legal fiction entertained in Alabama v. Pugh, 438 U.S. 781 (1978), a case not involving race, nor equal protection, would exculpate the outrageous State-action violations in this Ohio case, if the State's gross racial inequalities were being dealt "the other way around."

Query: If Brown can sue the Board of Education, then why can't Murray sue the Board of Parole?

Petitioner just doesn't understand, unless he resigns himself to the cynical premise that some civil rights litigants are more equal than others.

Curiously, the Ohio Adult Parole Authority did not raise the immunity issue

when it defended on the merits against an inmate's 14th Amendment non-racial due process claim. State ex rel Van Curen v. Ohio Adult Parole Authority, 345 N.E.2d 75, (1976).

It now raises the immunity issue when its "racial balance" policy is the subject of an inmate's 14th Amendment equal protection claim.

In the spirit of Brown, there would seem to exist inherent U.S. Constitutional harm in the State's very act of drawing suspect classifications according to race.

Indeed, Ohio's unseemly "B" and "W" distinctions are veritable State-engraved scarlet letters in black and white, adding new meaning to the term "letter of the law," and encoding it as the operative variable that counts, ..and accounts, for double standards of parole worthiness.

As Separate and Unequal, the lasting and sickening legacy of Ohio's "racial

balance" policy is its poisonous effect to the heart and mind of the beholder, who looks pale in comparison, and tries not to think the worse for it.

It's not overstating this case to cite the suing of a "Board" of Education, paraphrasing the wisdom of its decision, and claiming an equal right for suing a Parole Board itself, both needed and pleaded here.

See Patsy v. Florida Board of Regents, 457 U.S. 496 (1982). Finney v. Arkansas Board of Corrections, 505 F.2d 194 (8th Cir. 1974). Africa v. Commonwealth of Pennsylvania, 662 F.2d 1025 (3rd Cir. 1981). People ex rel Murray v. New York State Board of Parole, 417 N.Y.S.2d 286 (N.Y.A.D. 1979). Also, the aforementioned State ex rel Van Curen v. Ohio Adult Parole Authority, 345 N.E.2d 75 (1976), in which Ohio attorneys, on behalf of an inmate Van Curen, litigated a suit against the appropriate, correctly targeted Defendant, by the State's

own admission, and by no mere coincidence ...the Ohio Adult Parole Authority.

Answerable to the U.S. Constitution, the State of Ohio "B and W letters of the law" are not the total work of any one man, nor should any one man, or scapegoat, bear such burdens in the stead of the State.

For in the overall scheme of things, Ohio's racial balance policy can and will survive the suing of Raymond Capots alone, through an already well-entrenched labyrinth of pandemic State-action osmosis.

Mr. Raymond Capots may come and go, but the State's racial transfer lists and racial bed and cell charts are built-in, State-sealed, and functionally literate to the perpetuation of this 50/50% median strip of Camelot in hell.

Given the State Seal of approval, Ohio's two-tiered racial blueprints, lists, charts, and forms are not the property of Raymond Capots, but are the property of

the State of Ohio.

And as a prisoner-parolee, I am not the legal ward of Raymond Capots, but I am the legal ward of the State of Ohio, ..my legal Guardian.

I realize that such a guardian to ward, State to prisoner "relationship" has stripped me of any due process rights. Slocum v. Georgia State Board of Pardons and Paroles, 678 F.2d 940 (11th Cir. 1982).

Hence, the equal protection clause is all I've got left of the 14th Amendment; and without the power to enjoin the State agency itself, the equal protection clause is a lip-serviced, toothless wonder against my legal Guardian, my real Guardian, the State of Ohio.

Accordingly, the 14th Amendment does not read...."Nor shall any Capots," but reads...."Nor shall any State."

Again, I ask, Does the equal protection clause of the 14th Amendment to the

U.S. Constitution really mean what it says?

Transcending any one man, the State of Ohio's racially dual parole authority has an established, structurally dynamic, larger than life, State-entitied continuum of its own. It exists. It is very real, and no one wants to have to talk about it, but sooner or later, someone has to address the U.S. Constitutional issues involved.

In my case, Murray v. Ohio Adult Parole Authority, et al, I have sincerely tried my utmost to address these issues and have explained this situation to the best of my abilities.

Whereupon I, Gene P. Murray, petition the Supreme Court of the United States for the Writ of Certiorari, re Case No. 90-3071 of the U.S. 6th Circuit Court of Appeals.

Respectfully Submitted,

Gene P. Murray

Gene P. Murray, Petitioner
In Pro Se Parolee

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No. 90-3071

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GENE P. MURRAY
Plaintiff-Appellant

v.

OHIO ADULT PAROLE AUTHORITY;
RAYMOND E. CAPOTS, Chairman
Defendants-Appellees

- - - - -

O R D E R

BEFORE: WELLFORD and NELSON, Circuit Judges; and MEREDITH, District Judge*

Gene P. Murray, a pro se Ohio prisoner, appeals the judgment of the district court dismissing his civil rights complaint filed under 42 U.S.C. Section 1983. This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth

*The Honorable Ronald E. Meredith, U.S. District Judge for the Western District of Kentucky, sitting by designation.

Circuit. Upon examination of the record and the briefs, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Seeking monetary and injunctive relief, Murray sued the Ohio Adult Parole Authority (OAPA) and Raymond Capots, its Chairman, for violating his fourteenth amendment rights to due process and equal protection by allegedly denying his application for parole on the basis of his race. Murray alleged that the OAPA impermissibly makes its parole determinations for male prisoners convicted of aggravated vehicular homicide or involuntary manslaughter involving alcohol or drugs on the basis of the prisoner's race. He alleged that blacks are routinely granted parole at their first hearing while whites are routinely denied parole at their first hearing in order to maintain a 50-50 racial balance in Ohio's prisons despite a higher percentage of

incoming black inmates. Murray further alleged, citing specific instances, that the risk points of some black inmates were fraudulently and illegally reduced in order to allow their release at their first parole hearing within the risk point guidelines set up by the OAPA. Murray sought an injunction requiring the OAPA to cease using the race of an inmate as the determinative factor in parole decisions in Ohio; a court order requiring the OAPA to abide by its own risk points guideline system and cease falsification of risk points documents; and $10,000,000 in compensatory and punitive damages, to be voluntarily donated to worthy causes.

Interpreting Murray's complaint as a civil rights action under 42 U.S.C. Section 1983, the district court granted the defendants' action for judgment on the pleadings, pursuant to Fed. R. Civ. P. 12(c), based on state immunity under the

eleventh amendment.

On appeal, Murray continues to argue the merits of his case, urging that the district court erred in finding the OAPA's "affirmative action plan" protected by the eleventh amendment. Murray also maintains that his suit was incorrectly considered under Section 1983.

Upon review, we shall affirm the district court's judgment on the pleadings to the extent that it dismissed Murray's state claim, his due process and equal protection claims against the OAPA, and his due process claim against Capots; however, we shall vacate the judgment to the extent it dismissed Murray's equal protection claim against Capots.

Initially, it is noted that, despite Murray's protests to the contrary, the district court did not err in considering his complaint under 42 U.S.C. Section 1983. Murray's pleadings and briefs indicate

that he is under the mistaken impression that Section 1983 is a habeas corpus statute, rather than the appropriate means for a prisoner to seek redress of a violation of his constitutional rights.

The district court properly dismissed Murray's claim that the OAPA violated its own risk points guidelines because the eleventh amendment prohibits a federal court from ordering state officials to obey state law. Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 106 (1984). Moreover, Murray's civil rights suit against the OAPA is barred as to both monetary and injunctive relief by the eleventh amendment. Will v. Michigan Dep't of State Police, 109 S. Ct. 2304, 2311-12 (1989); Papasan v. Allain, 478 U.S. 265, 276 (1986).

Capots, sued in his official capacity, is immune from suit for monetary damages. Will v. Michigan Dep't of State Police, 109 S. Ct. at 2311-12; Wells v. Brown,

891 F.2d 591, 592-93 (6th Cir. 1989). However, a federal court may, consistent with the eleventh amendment, enjoin state officials to conform their future conduct to the requirements of federal law. Will v. Michigan Dep't of State Police, 109 S.Ct. at 2311 n.10; Quern v. Jordan, 440 U.S. 332, 337 (1979). Thus, the district court erred in dismissing Murray's claims against Capots for injunctive relief under Will.

Murray's due process claim is meritless, nonetheless, because Ohio has created no statutory entitlement to parole upon which a due process claim may be grounded. Wagner v. Gilligan, 609 F.2d 866, 867 (6th Cir. 1979).

In reviewing a judgment on the pleadings, we must take as true the material allegations in the pleadings of the non-moving party. Only if the moving party is clearly entitled to judgment notwith-

standing the truth of such allegations may the judgment be affirmed. National Metro. Bank v. United States, 323 U.S. 454, 456-57 (1945); Southern Ohio Bank v. Merrill Lynch, Pierce, Fenner, and Smith, Inc., 479 F.2d 478, 480 (6th Cir. 1973). If his allegations are taken as true, as they must be in this appeal, Murray has stated a facially sufficient equal protection claim; namely, that parole decisions for his class of offenders are arbitrarily made and are based on racial considerations. To the extent that he seeks a speedier end to his own confinement, Murray's sole remedy is a writ of habeas corpus. Preiser v. Rodriguez, 411 U.S. 475, 500 (1973). But to the extent he seeks a future injunction to cease a racially discriminatory state parole scheme, Murray's claim is cognizable under Section 1983 and survives judgment on the pleadings. See generally

McCleskey v. Kemp, Sup't Ga. Diagnostic and Class. Center, 481 U.S. 279, 292 (1987); Oyler v. Boles, 368 U.S. 448, 456 (1962).

Accordingly, the district court's judgment on the pleadings regarding Murray's state claim, claims against the OAPA, claim for monetary damages, and due process claim is hereby affirmed. Rule 9(b)(5), Rules of the Sixth Circuit. However, to the extent the district court dismissed Murray's claim against Capots for injunctive relief, based on the equal protection clause, the judgment is hereby vacated and the case is remanded for further proceedings. Rule 9(b)(6), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

LEONARD GREEN
Clerk

ISSUED AS MANDATE: November 8, 1990
COSTS: None

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

GENE P. MURRAY,
Plaintiff

vs.

OHIO ADULT PAROLE AUTHORITY, et al.,
Defendants

Civil Action C-2-89-837

OPINION AND ORDER

Plaintiff, an inmate at the Marion Correctional Camp, brings this action under the provisions of 42 U.S.C. Section 1983, claiming that he was denied the equal protection of the law when he was allegedly denied parole on the basis of his race, i.e., white. Named as defendants are the Ohio Adult Parole Authority and its Chairman, Raymond Capots. This matter is now before the Court on defendants' motion for judgment on the pleadings.

The Ohio Adult Parole Authority is an agency of the State of Ohio and therefore enjoys the immunity from litigation in federal courts conferred by the Eleventh Amendment to the United States Constitution. See Alabama v. Pugh, 438 U.S. 781 (1978); Ohio Inns, Inc. v. Nye, 542 F.2d 673 (6th Cir. 1976), cert. denied, 430 U.S. 946 (1976). As it relates to the Ohio Adult Parole Authority, then, the motion for judgment on the pleadings is meritorious.

Nowhere in the complaint, however, has plaintiff expressly articulated the capacity of defendant Capots in which plaintiff seeks to base liability. "The face of the complaint must indicate whether a plaintiff seeks to recover relief from defendants directly, or to hold the state responsible for the conduct of its employees." Wells v. Brown, ___F.2d___, (6th Cir., December 12, 1989). Review

of the complaint convinces this Court that plaintiff has named Raymond Capots as a defendant in his official capacity only. Plaintiff identified defendant Capots in the caption of the complaint only as "Raymond Capots, Chairman." This defendant is also referred to, along with the defendant parole authority, in the first paragraph of the complaint. Thereafter, however, plaintiff refers only to the defendant parole authority, and he seeks relief, both injunctive and monetary, only from this state agency. This Court therefore concludes that defendant Capots has been joined only in his official capacity and is therefore protected from responding to plaintiff's claims in this Court by virtue of the Eleventh Amendment. See Will v. Michigan Department of State Police, ___U.S.___, 109 Sup.Ct. 2304 (1989).

Accordingly, the motion for judgment on the pleadings is meritorious and is

therefore GRANTED.

This action is hereby DISMISSED.

James L. Graham, Judge
United States District Judge

CERTIFICATE OF SERVICE

I, Gene P. Murray, hereby certify that a copy of the foregoing Petition and Appendix was duly mailed on this 26th day of January, 1991, via First Class Regular U.S. Mail to:

The Ohio Adult Parole Authority
The Ohio Parole Board
Raymond Capots, Chairman
1050 Freeway Drive North
Columbus, OH 43229

and to:

Office of the Ohio Attorney General
Robert L. Griffin, Trial Attorney
State Office Tower, 26th Floor
30 East Broad Street
Columbus, OH 43266-0410

Gene P. Murray

Gene P. Murray, Petitioner
Parolee, in Pro Se

Gene P. Murray
513 W. Culbertson Street
Fostoria, OH 44830
419/435-2284